CRIMINAL APPEAL NO. 575 OF 1990.
with
Criminal Appeal No. 627 of 1990
with
Criminal Appeal No.732 of 1990.

Date of decision: 5.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr.M.J. Budhbhatti, amicus curiae, for appellant in Cr.Appeal No.575 of 1990.
Mr. K.P. Raval, APP for respondent-State.
Mr. M.J. Budhbhatti, advocate for appellant in Cr.Appeal No.627 of 1990.
Mr. K.P. Raval, A.P.P. for respondent-State.
Mr. K.P. Raval, A.P.P. for the appellant-State in Criminal Appeal No.732 of 1990.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

February 5, 1996.

Oral judgment (Per Jain, J.)

Since all these appeals arise from the same judgment delivered by learned Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No.44/89, are disposed of by this common judgment.

Appeal No.575 of 1990 has been preferred by accused No.2 Natvarsing Chamansing Rajput, whereas Appeal No.627 of 1990 has been preferred by accused No.1, Ajitsing Pratapsing Rajput, against their conviction whereas Appeal No.732 of 1990 has been preferred by State of Gujarat for enhancement.

The incident occurred in the night intervening 22nd and 23rd December 1988, a night preceding the full moon night, when the injured Bai Chanduben was sleeping in varandah of her house. In the late hours of the night, accused Nos.1 and 2 entered her compound after breaking open the lock and committed robbery. In the course of committing robbery, the witness Bai Chandu was seriously injured. The accused not only caused serious injuries but also amputed her legs and took away anklets. In this background, a complaint was lodged and investigation set put in motion. After completing investigation, chargesheet was filed against four accused, who were put to trial in the aforesaid Sessions Case. At thee trial the learned Additional Sessions Judge, Banaskantha at Palanpur, convicted accused No.1/appellant of Appeal No.627 of 1990 under Section 397 of the Indian Penal Code and accused No.2/appellant of Appeal No.575 of 1990 for the offence under Section 394 read with Section 34 of the Indian Penal Code whereas accused Nos.3 and 4, Rajput Abaji Bhomaji and Rabari Bhikhabhai Govabhai respectively came to be acquitted. Aggrieved by the judgment and sentence passed by the learned Additional Sessions Judge, accused Nos.1 and 2 preferred the appeals referred to hereinabove and feeling that looking to the nature of injuries and the very gruesome and heinous act, the sentence passed is insufficient, therefore, the State preferred appeal for enhancement of sentence imposed on accused Nos.1 and 2.

Accused No.1/appellant of Criminal Appeal No.627 of 1990 is represented by learned advocate Mr. M.J. Budhbhatti whereas from the record we find that accused No.2/appellant of Criminal Appeal No.575 of 1990 is represented by Mr. Patel. However, at the time of hearing Mr. Patel did not remain present despite several

calls and, therefore, we requested Mr. Budhbhatti also to argue qua accused No.2 and enlighten the court on merits. To this, Mr. Budhbhatti accepted the suggestion and assisted the Court as amicus curiae in Criminal Appeal No.575 of 1990 preferred by accused No.2.

Mr. Budhbhatti, the learned advocate for the appellants, has vehemently argued that accused have been falsely roped in and the case if fabricated. Secondly, the case is based on evidence of sole injured eye witness, Smt. Chanduben Halaji, P.W.6, Ex.37; and looking to the contradictions emitting from her evidence and that her condition was such that she could not have spoken anything, her evidence cannot be relied as trustworthy and reliable. Thirdly Mr. Budhbhatti contended that the version of sole injured eye witness does not get corroboration from any other independent witness. Last contention is that the names of accused were neither disclosed in the FIR nor in the information sent to the police on wireless.

Dealing with third contention first, we do not find any substance for the simple reason that at the time when the incident took place, the injured witness, P.W.6, Smt. Chanduben, wife of Halaji, was alone at the place of incident. It was late in mid night hours that the accused entered the house of this witness. Accused No.2 gagged her whereas accused No.1 snatched key and opened the lock and then virtually both of them dragged her from varandah to inside and then opened the boxes ransacked and plundered ornaments. Then they desired to take anklets but were not able to remove and, therefore, accused No.1 took an axe lying there and brutally cut the feet and removed the anklets. With this gruesome act also the accused No.1 was not satisfied hence while going he caused injury with the axe on her skull and then left the place of offence with ornaments.

The witness was lying alone. She fell unconscious and could not shout for help hence nobody could have been expected to be there to witness, therefore, her evidence could not be expected to be corroborated by any other independent witness. The question of corroboration arises only when evidence of independent witness is available. In this case, when the evidence of any other independent eye witness is not at all available or even by no stretch of imagination could have been procured. Therefore, question of corroboration does not arise consequently finding no substance in this contention, is hereby rejected.

Apart from this fact, there was no chance for the prosecution to procure any evidence of eye witness. It has come on record that while committing robbery, the injured witness Bai Chandu was squelched and, therefore, she could not have raised any cry or alarm with a view to seek help from any person. Even otherwise also the circumstances suggest that she being alone, facing two young assailants, it was rather not possible for her to resist and raise alarm.

Mr. Budhbhatti has argued that the names of accused were not disclosed in the information given by one Chenji Bhomji, a distant relative of injured witness, Bai Chandu Halaji. Object of giving information to the police or investigating agency is to inform the police about commission of cognizable offence. It is always not necessary that names of the accused have to be given. Of course, information given by Chenji Bhomji has not been placed on record as has not been exhibited and, therefore, we cannot look into. However, academically also, we say that disclosure of commission of cognizable offence is sufficient for the investigating agency and it is then for the investigating agency to find out truth by investigation. It is the duty of the investigating agency to find out as to who are the real culprits and put them to trial and, therefore, this circumstance also may not amount as fatal. The person who gave alleged information was not present at the time and place of offence. Chenji Bhomji came to know about the incident only in the morning at about 10 A.M. and then informed the police. Till he informed police he had no opportunity of having talk with injured, the sole eye witness as was unconscious and, therefore, whatever he saw was reflected in the information given to the police. Nothing more could have been expected from this witness. We find from the evidence of P.W.11, Ex.46, Kalubhai Godadbhai, Head Constable, one who went to hospital to record statement of injured that initially for want of complete details as only a note was made in the police station diary about the occurrence of offence and he proceeded to the hospital to record statement of injured. During the course of recording statement, he got true version as well as disclosure of names of the present appellants. This is evident from Ex.50, report made to the concerned Police Sub Inspector. This report was made by the witness at about 4 P.M. on 23.12.1988. This is the earliest time at which police got true version including names of accused setting the investigation in right direction. Thus, the contention finding no favour, deserves to be rejected.

Mr. Budhbhatti next contends that looking to the nature of injuries, the injured could not have been able to speak and narrate the incident to anybody and, therefore, whatever she now says is an improvement and reliance cannot be placed upon her testimony. Mr. Budhbhatti has also relied upon some of the contradictions. The act of disclosure of events by injured to anybody is always preceded the actual occurrence. It cannot be gainsaid that at the time of actual occurrence, P.W.6, Bai Chanduben Halaji was fully conscious and was able to identify the accused. Incidentally, we may say that accused No.1 is in close relation, that is, son of her husband's cousin brother, and accused No.2 is from the same locality and community. In her evidence, Ex.37, she has categorically stated that when she heard some noise, she got up, inquired and she got the answer from both the accused saying that they have come to have a glass of water and then they stood by near her cot. Thus, before occurrence she was conscious and was able to identify both the accused by having a very close look as well as by voice. The fact that the incident occurred in the night proceeding the night of full moon night, it could not have been difficult for the injured witness to identify both the accused in bright moon light. Apart from these facts, when one is related, may not be difficult to identify by voice also. Therefore, the injured had full opportunity to identify both the accused without any doubt. Further, when a witness comes to depose after couple of months cannot be expected to have photographic memory and bound to give rise to some contradictions, omissions or improvements and if not relevant on material aspect then have to be ignored. In this case also the contradictions pointed are immaterial do not shatter merits. It is true that as a consequence of serious injuries, she fell unconscious but that is immaterial for the purpose of identification of accused for the simple reason that the injured fell unconscious only after occurrence and prior to that being conscious had already identified and, therefore, find that the evidence coming forth from this witness is trustworthy and reliable.

Mr. Raval, learned .P.P. has also taken us through the evidence of injured witness. In her cross-examination we find no challenge to this aspect. The fact that the incident occurred in the night preceding the full moon night and that there was full moon light is not challenged. Therefore, all these circumstances considered together, we hold that the injured witness has properly identified the accused, without leaving any

doubt her testimony is reliable and trustworthy.

Nothing convincing has been brought on record as to why this witness should falsely implicate both the accused. Normally, an injured eye witness is a stamped witness and in ordinary course the injured person would not leave the real culprit to go scot-free and implicate any innocent. Of course, this presumption is rebuttable and depends upon facts and circumstances of individual case but in this case nothing material has been brought on record to rebut this presumption and to establish that both the accused have been falsely implicated owing to some enmity or on account of some other reason.

The contention that with such injuries she could not have been able to speak a word and, therefore, could not have made any statement to any person after the incident also does not gain ground from the evidence placed before us.

Learned A.P.P. Mr. Raval has taken us to the evidence of P.W.3, Ex.25, Dr. Shrikant Chhotalal Gupta, Medical Officer in Civil Hospital, Palanpur, who immediately attended the injured. He states that the injured was brought in hospital at about 12.30 P.M. on 23.12.1988 and on examination she was found conscious. This witness also issued injury certificate, Ex.32. In that medical certificate also he has categorically stated that the patient was conscious when examined. Not only this, in para 5 of his testimony he has stated that during the course of treatment, Mamlatdar had also come with Yadi, Ex.24, to record statement of the injured and before recording statement, the Mamlatdar inquired about the condition of the patient and after examination and having found her conscious and able to speak, he made such endorsement on Ex.24. This evidence has gone unchallenged as except making general suggestion no pointed and pertinent question was asked about consciousness and inability of patient to speak with such injuries. This circumstance gets corroboration from the evidence of P.W.2, Ex.23, Executive Magistrate, who recorded statement of the injured. In paragraph 2 of his evidence he categorically states that when he visited her in hospital for recording statement, Dr. Gupta was present. Though the injured was serious, was conscious and was able to speak and he also obtained an endorsement to this effect on Ex.24. We find no cross-examination on this point on behalf of accused No.1. This leads us to hold that in absence of specific challenge we have no reason to disbelieve the prosecution version that at the time when she was brought to hospital for treatment and at the time when P.W.2, Executive Magistrate, recorded

the statement, she was conscious and was able to speak. This contention is further dismissed by the material brought on record in cross-examination on behalf of accused No.2. With a view to challenge the statement recorded by P.W.2, Executive Magistrate, a suggestion was made that answers were given by gesture and not by words. The suggestion is flatly denied amply making clear that while making statement the answers were given by words and not by gestures.

To fortify his contention that all throughout the injured was unconscious and could not have been able to speak, Mr. Budhbhatti has taken us to the evidence of P.W.1, Ex.18, and the certificate at Ex.19. P.W.1, Dr. Sureshbhai Manibhai, is Medical Officer, attached with Civil Hospital, Ahmedabad, where the injured was shifted from Palanpur Hospital. It is true that at the time when she was brought in Civil Hospital, Ahmedabad, was found unconscious as is evidence from Exs.18 and 19. But, in our view, this may not help the accused because in Civil Hospital, Ahmedabad, she was brought at a later point of time but prior to that she had already been treated in Civil Hospital, Palanpur. Admission to Civil Hospital, Palanpur was prior in point of time and at that time she was found conscious as is evident from the evidence of P.W.3, Ex.25, and injury certificate Ex.32. The doctor has said that with such injuries by afflux of time the patient will be dragged to unconsciousness which also may be cyclical. Therefore, the fact that when she was brought to Civil Hospital, Ahmedabad, was unconscious may not be relevant and cannot be presumed that she was conscious when she was treated at Civil Hospital, Palanpur. For the sake of repetition, we say that on this point also we do not find any material cross-examination except asking general questions as to what may happen in such circumstance. In order to place reliance upon facts elicited in answers to general suggestions, a pointed suggestion has to be made that when the injured was in such condition she could not have been able to speak or was unconscious but in absence of any particular challenge to this aspect also we do not find any substance in this contention, more so when medical evidence supports the prosecution case.

As regards unconsciousness of the injured person with such injuries, the evidence of P.W.1, Dr. Sureshbhai Mohanbhai Naik, Medical Officer, Civil Hospital, Ahmedabad, is very material. In para 5 of his testimony, Ex.18, he has stated in cross-examination that injuries were not such that would render the injured permanently unconscious. He has explained that as a result of shock,

the injured may get unconscious and then again regain. By saying so he meant that it is cyclic and consciousness may be lost and regained. He has further clarified that with such injuries it is not always necessary that the injured would get consciousness only after treatment. He has emphatically turned down the suggestion and he has adhered to his opinion that even without treatment also the injured can regain consciousness. The witness is a Medical Officer and his evidence is that of an expert. Since his testimony has not been confronted with any other possible opinion or conclusion, we have no reason to disbelieve or discard his evidence. Thus, on overall consideration, we find that the evidence led by prosecution is reliable, trustworthy and otherwise cogent and credible.

The circumstance that the entire case is based on the evidence of sole injured eye witness cannot be given much weight as otherwise also the circumstances are clear that it is a case wherein no other eye witness was present or even presence could not be presumed or assumed and, therefore, the only course available to the prosecution was to lead evidence of injured eye witness. We have been taken to the oral and documentary evidence by both the sides in support of their respective contentions. In the background of discussions had above, we are of the opinion that the learned Additional Sessions Judge was right in treating the evidence as reliable, trustworthy, cogent and credible and convicted the accused. Consequently, we do not find any substance in both the appeals, that is, Criminal Appeal Nos.575 of 1990 and 627 of 1990 preferred by the accused persons against conviction and deserve to be dismissed.

Now comes the question of Criminal Appeal No.732 of 1990 preferred by the State for enhancement of sentence.
No doubt, the act of accused is very heinous, disgusting and horrible and deserves no mercy to be shown. While passing order of sentence, the learned Additional Sessions Judge has rightly said that with such injuries, namely, having her both legs amputed, the injured is facing a murderous situation every day and more than once. In case of murder, the victim dies only once whereas in such situation the injured victim is made to suffer for the entire future life and that too also recurrently. The victim would face enormous difficulty while negotiating routine activities from morning to late night, In this view of fact, while awarding sentence, a deterrent view is required to be taken. Accused No.1 has been sentenced for the offence under Section 397 of the Indian Penal Code which provided for minimum sentence of

7 years while the learned trial Judge has awarded sentence of 10 years which is reasonably on higher side than the minimum prescribed. As a cardinal rule, the sentence should only not be deterrent but also afford an opportunity for reformation. In this case, the accused are aged about 20 years and by sentencing them for 10 years rigorous imprisonment, we feel would be sufficiently deterrent and even after serving sentence will have long way to cross with repentence which may prove to be reformative in the rest of their life. Similarly, maximum sentence provided for offence under Section 394 of Indian Penal Code is life or 10 years with fine. Keeping in mind the age of accused, the learned Additional Sessions Judge has rightly awarded sentence of ten years and, therefore, we approve the same as being adequate in the facts and circumstances of the case hence find no scope for enhancement of sentence in Criminal Appeal No.732 of 1990. Therefore, Criminal Appeal No.732 of 1990 also stands dismissed.

In the result, all the three appeals are dismissed.